

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

76-2161

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FELIX CASTRO,

Petitioner-Appellant,

-against-

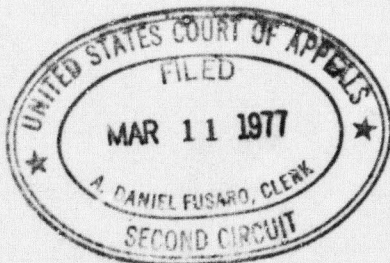
EUGENE LEFEVRE, Superintendent,

Respondent-Appellee.

Docket No. 76-2161

APPENDIX FOR APPELLANT FELIX CASTRO

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY
Attorney for Appellant
FELIX CASTRO

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PHYLIS SKLOOT BAMBERGER,

Of Counsel.

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P/K

DIST. OFFICE	DOCKET YR. NUMBER	FILING DATE MO. DAY YEAR	J	N/S	O	R	R 23	DEMAND OTHER	JUDGE NUMBER	JURY DEM.	DOCKET YR. NUMBER
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PLAINTIFFS

CASTRO, FELIX

DEFENDANTS

LeFERVE, EUGENE, SUPT., Clinton Correctional Facility

CAUSE

F.L.

WRIT OF HABEAS CORPUS
28 USC 2254

ATTORNEYS

Pro Se:
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For Defendant:
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Attorney General- State of NY
Two World Trade Center
N.Y., N.Y. 10047

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<input checked="" type="checkbox"/> CHECK HERE IF CASE WAS FILED IN	DATE	FILING FEES PAID RECEIPT NUMBER	C.D. NUMBER	STATISTICAL CARDS
	MAY 20 1976	1415		CARD JS-5 <input checked="" type="checkbox"/> DATE MAILED

76-2261

Felix Castro -V- Eugene LeFerve, Supt. Clinton Corr. Facility

76

DATE	NR.	PROCEEDINGS
05-20-76	1	Filed petition for writ of habeas corpus.
05-20-76	2	Filed order granting petitioner to proceed in forma pauperis, Wyatt, J.
06-22-76	3	Filed affdvt. and order extending respondent's time to file opposition to petitioner's application for writ of habeas corpus. to 7/12/76.-- Knapp, J.
07-21-76	4	Filed affdvt. and order extending respondent's time to file opposition to petitioner's application for writ of habeas corpus to 8/15/76.-- Conner, J.
08-24-76	5	Filed respondent's (Joan P. Scannell) affdvt. in opposition to petitioner's application for writ of habeas corpus.
08-23-76	6	Filed notice of assignment to Brieant, J.
9-15-76		Fld Petitioner's answering affdvt to Respondent's opposition. Petition
9-30-76		Fld Memo End on bk of petition fld 8-23-76=The petition petition is denied... Brieant mn.

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By E. A. [Signature]
Deputy Clerk

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Endorsement

FELIX CASTRO, Petitioner v. EUGENE LeFEVRE, Superintendent,
Clinton Correctional Facility, Respondent. Pro Se 76 Civ. 2261-CLB

Petitioner, a New York State prisoner, seeks a writ of habeas corpus pursuant to 28 U.S.C. §2254. On his plea of guilty, he was convicted on April 25, 1974 of robbery in the first degree. His conviction was affirmed by the Appellate Division, First Department and leave to appeal to the New York Court of Appeals was denied.

Petitioner now claims that his sentence was erroneous because he "was never advised that he had a right to controvert" a second or predicate felony offender information filed on the date of sentence. Through his experienced attorney, who had represented him in the prior felony case, petitioner admitted the prior judgment of conviction on June 30, 1967. He now claims that he was never told that he had the right to challenge the prior conviction on factual or constitutional grounds.

Unless it rises to a level of denial of due process under the Fourteenth Amendment, mere procedural irregularity or non-compliance with New York statutory procedural provisions will not require granting the writ. Here, petitioner was read the second offender information in open court prior to sentence and granted leave to confer with his attorney. His attorney admitted the predicate felony in his presence. He waived his right to a hearing, and remained mute at sentencing. Neither he nor his attorney objected either before or after the sentence, which conformed fully to the sentence bargain pursuant to which charges against petitioner were reduced and a guilty plea entered.

There is no violation here of any federally protected right. The petition is denied.

So Ordered.

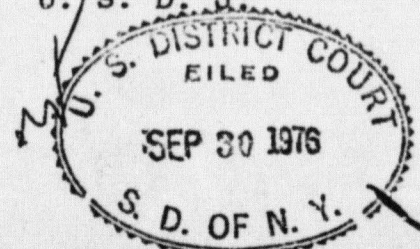
Dated: New York, New York
September 28, 1976

Charles L. Brieant

Charles L. Brieant
U. S. D. J.

MICROFILM

SEP 30 1976



IND. NOS. 2966-73, 3211-73

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - TRIAL TERM PART XVI

-----x
THE PEOPLE OF THE STATE OF NEW YORK

-against-

SENTENCE

FELIX CASTRO,

Defendant.

-----x
(Robbery 1st Degree)

Bronx, New York

April 25, 1974

B e f o r e :

HON. ISIDORE DOLLINGER,

J u s t i c e

Appearances:

For the People: MARIO MEROLA, ESQ.
District Attorney, Bronx County

BY: BARPY DASSIK, ESQ.
Assistant District Attorney

For Defendant: OSCAR GONZALEZ SUAREZ, ESQ.

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Jacqueline Birkhahn, CSR
Official Court Reporter

Exhibit C

Sentence

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COURT CLERK FRASCINELLA: People of the State of New York against Felix Castro on two indictments.

(The defendant is present in the courtroom; also his counsel and the Assistant District Attorney.)

COURT CLERK FRASCINELLA: Felix Castro, is that your name?

THE DEFENDANT: Yes.

COURT CLERK FRASCINELLA: You are arraigned for sentence on Indictment 2966 of 1973 wherein you pleaded guilty to the crime of robbery in the first degree, a Class B felony. That plea is to cover also Indictment 3211 of 1973.

Has the District Attorney a statement to make to the Court?

MR. BASSIK: Your Honor, I would just state that at the time the plea was taken, it was agreed that the People would take no position on sentence and we would not object to the Court in its discretion treating this as a C felony for sentence.

THE COURT: Wait a minute, now. Is he a predicate felon?

MR. BASSIK: Yes, he is. I filed papers.

THE COURT: Does Mr. Suarez have the papers?

MR. BASSIK: I served Mr. Suarez' office.

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MR. SUAREZ: No.

MR. BASSIK: It was sent.

MR. SUAREZ: I haven't been served with any.

MR. BASSIK: I have here as well an affidavit of service (document handed to Mr. Suarez). That's my copy, Mr. Suarez, but it was sent to your office.

MR. SUAREZ: All right.

MR. BASSIK: Does the Court have its copy?

THE COURT: No.

(Document handed to the Court)

THE COURT: The statement that was exhibited to you, Mr. Suarez, indicates that on May 15, 1967 this defendant pled guilty to attempted manslaughter in the second degree, a Class D felony, to cover Indictment No. 609 of 1967. This plea was taken in Bronx County and on June 20, 1967 the defendant was sentenced to five years on this plea by Judge Arthur Markewich. Now, does he admit to this?

(Mr. Suarez conferred with the defendant)

MR. SUAREZ: Yes, Judge.

THE COURT: All right, the defendant admits to this. Defendant is a predicate felon.

COURT CLERK FRASCINELLA: Mr. Castro, do you want to say something to the Judge before you are sentenced?

THE DEFENDANT: No.

COURT CLERK FRASCINELLA: Mr. Suarez, do you wish to address the Court?

MR. SUAREZ: Yes. Your Honor, there is a full and complete probation report on this defendant before your Honor. There is not much I could add to that report except to point out that most of the difficulties that beset this defendant had their origin in his drug addiction. It is an unfortunate situation that not until after he found himself in this predicament he decided to do something about this addiction and did try to correct it.

I have here a letter and I would like to make it part of the record, addressed to your Honor, and this is from the Rikers Island Central Referral Unit of the Addiction Services of New York City (handing document to the Court) and, of course, I realize that your Honor has a very difficult situation in his hands in dealing with this defendant, for one of the basic considerations in the imposition of sentence under the standards set out by the American Bar Association is whether or not the community would be safeguarded by whatever imposition of sentence the Judge deems in its discretion.

I know that this defendant stands convicted of a

crime of violence. I realize that once before he was also involved in a crime of violence but, as I pointed out, these crimes did have their origin in the defendant's addiction.

Now, the defendant is only 27 years and the father of two children, and in my mind I wonder, and I wonder whether or not society has failed the defendant or the defendant has failed society. That is a question beyond me to understand at this moment, but needless to say I am very concerned with this defendant because of his apparent youth, because, having had contact with the defendant at an early age, I know the defendant since he was a child. I represented him in that manslaughter case. I know his mother, his father, his entire family, and they are good people, down to earth individuals, God-fearing citizens, and the defendant had to go the wrong way from an early date.

I wonder whether incarceration will be the answer or the key and perhaps treatment that would restore him to the normal values of manhood, and I wonder whether the Court in its discretion will find a means to enhance this opportunity of the defendant if there is one presented from the probation report.

I know it is a hard duty and one of the most

difficult tasks for an attorney to plead for clemency in a case in which the defendant by his own admission pleads guilty to a heinous crime. I don't want to minimize that, your Honor, but I say that when the defendant undertook to plead guilty after the termination of the several motions, the hearings which were had before your Honor, and the defendant saw the writing on the wall, whether or not that was an indication inside of the defendant, regardless of any apparent misconception that he was really reluctant to go ahead and then from then on he decided to show his remorse, his reluctance to engage again in any other criminal activity, and this is where I say that we may be still in the middle of some reform to allocate individuals such as this that have potentialities into a program of channelizing into some sort of activity under supervision that could restore him to the society he has offended.

I rest on your Honor's understanding of humanity and feeling towards his fellow man, and at this time without any further ado I throw both the defendant and myself on the mercy of this Court.

THE COURT: Mr. Suarez, you have made an eloquent plea for your client and I wish I could go along with

Sentence

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your thinking. Unfortunately I must go by the record and what has transpired. In the first place, let me indicate, you speak about his drug addiction and there is some evidence with respect to that. There had been no examination made recently, and it wouldn't make any difference because it is not my intention to permit him to go to a drug program. He's had the opportunity in the past. He has not availed himself of it.

This is the defendant's tenth conflict with the law and he has in the past been given probation, in 1964, as a matter of fact, after he had been placed on probation in both the Manhattan Criminal Court and Manhattan Supreme Court and he was discharged unfavorably from both, so he has not learned from that experience.

Now, here we have a situation where he is and he has admitted to his prior felony conviction which was based upon a crime committed in 1967. It was a crime of violence. Now, you have also in this particular case when I took the plea on March 14, 1964, I took the plea to Indictment 2966 of 1973 which was robbery in the first degree, a Class B felony, and that of course, was intended to cover and did cover another robbery in the first degree under Indictment 3211 o

1973, and I think the People were very generous in their recommendation, although there was nothing for me to accept. I still could have gone with the recommendation when they indicated on the record that they would have no objection to me treating this as a Class C case, and the fact that they have indicated that does not bind my hands, as you very well know.

Nevertheless, I am going to accept not their recommendation but the fact that they have no objection and I am going to sentence him as a Class C felon, and, of course, he being a predicate felon, this is his second felony conviction and I must, of course, give him a minimum, half of the maximum that I am going to impose, and so I sentence the defendant to an indeterminate term of imprisonment for a maximum of fifteen years and the minimum seven and a half years, and he is committed to the custody of the State Department of Correction until released.

COURT CLERK FRASCINELLA: Felix Castro, you have a right to appeal your conviction. If you intend to do so, you must file a notice of appeal with the Appellate Division within 30 days. If you have no money or means to hire your own lawyer, the Court will assign counsel. Do you understand that?

Sentence

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THE DEFENDANT: Yes.

Certified that the foregoing is a true and
accurate transcript of the stenographic record.

jacqueline R. Birkhahn
jacqueline birkhahn csr
official court reporter

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CERTIFICATE OF SERVICE

March 11 , 19 77

I certify that a copy of this brief and appendix
has been mailed to the Attorney General of the State
of New York.

Ally. SKE G. G.